

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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May 13, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

In early February, the Supreme Court granted applications for a stay of the Environmental Protection Agency's "Clean Power Plan." The Court's unprecedented order expressly and categorically stays the promulgated rule. The rationale for this extraordinary action was to save states and other stakeholders from taking actions, expending resources and incurring costs in response to a rule that may not be legal. Yet from the very first weeks following the order, EPA has been taking steps that circumvent the Court's stay and potentially undermine the relief provided by the stay in the first place.

On March 22, 2016, you testified before our Committee that, in response to the stay, EPA has "discontinued our implementation and enforcement of the rule," but that the agency had been and would continue to provide assistance relating to the rule to states that "voluntarily decide to move forward." We now see that, in addition to expending resources to provide "assistance" to individual states, EPA has been expending resources on several regulatory processes that are integrally related to the suspended rule and that would compel states and regulated entities in turn to expend resources to respond to these proceedings—or otherwise forego legal rights—and, indirectly, participate in implementation of the stayed rule.

Two weeks ago, EPA staff advised the Committee that the agency "sent a proposal with details about the optional Clean Energy Incentive Program (CEIP), a component of the Clean Power Plan, to the Office of Management and Budget for interagency review."¹ The CEIP is a program under which EPA would make "Emission Reduction Credits" or allowances available to states to reward early investments in wind and solar energy and demand-side energy efficiency

¹ See also <http://www.reginfo.gov/public/do/eoAdvancedSearch> (April 26, 2016; RIN 2060-AS84, "Clean Energy Incentive Program Design and Implementation; Pending Review").

projects. This new rulemaking proposal arises directly from the Clean Power Plan and, but for this rule, the new proposal would have no basis. Thus, it is of significant concern that this new rulemaking is proceeding when the underlying rule is categorically stayed.

In addition, the agency has confirmed it is moving forward with its proposed “Model Trading Rules” and other regulatory guidance for implementing the Clean Power Plan.² These rules and guidance similarly have no basis independent of the Clean Power Plan. To the extent EPA proceeds with any such actions to implement the stayed rule, it deprives states and other stakeholders the benefits of the stay by compelling participation in regulatory processes that inappropriately assume the validity of a rule that may ultimately be struck down.

Adding to this situation, EPA officials have also stated that certain compliance deadlines in the Clean Power Plan may not be tolled should the stay be lifted—the thrust of which is that states and other stakeholders would be prudent to begin voluntarily preparing now for rule implementation in case its legality is upheld.³ This “take action or else” messaging underscores indications that EPA, despite the stay, is seeking to coerce additional action to lock in compliance with the mandates of its rule—even if the rule is found to be unlawful.

In sum, the agency’s decision to move forward with a shadow regulatory structure to implement the Clean Power Plan presents several obvious concerns. Continuing to develop a suite of derivative rules and guidance raises questions about whether EPA is complying fully with the Court’s stay order, about what legal authority the agency has to proceed with such actions, about how these actions affect the equities of states and stakeholders, as well as about the agency’s stewardship and use of taxpayer resources.

In light of these concerns, we request additional information to assist the Committee in understanding the agency’s actions and the potential impacts of its actions. Pursuant to Rules X and XI of the U.S. House of Representatives, we ask that you provide written responses and responsive documents to the following requests by May 27, 2016:

1. What is the agency’s legal basis for proceeding with a regulatory proposal to implement the CEIP when the rule establishing this program has been stayed?
2. What statutory provisions does EPA believe authorize it to move forward with derivative regulatory proposals relating to the Clean Power Plan while the stay is in effect?
3. Identify all rulemakings, guidance, directives, or other regulatory actions the agency is currently pursuing that relate to the Clean Power Plan, and the statutory authority for proceeding with each such action.

² See April 18, 2016 Letter from Janet McCabe, Acting Assistant Administrator for Air and Radiation to the Honorable James Inhofe, available at http://www.epw.senate.gov/public/_cache/files/ca20cabb-4494-47af-822c-3e814707eb80/epa-response-to-tolling-letter-04-18-2016.pdf.

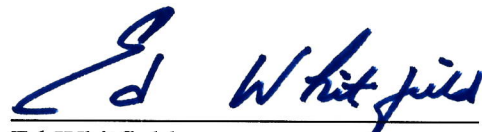
³ Statements raising uncertainty about tolling if the stay is lifted run contrary to the Solicitor General’s representations to the Supreme Court that the effect of the stay would be to toll all deadlines under the Clean Power Plan. See February 2016 Memorandum for the Federal Respondents available at <http://www.ago.wv.gov/publicresources/epa/Documents/M0117886-1.PDF> at pp. 2-3, 71-72.

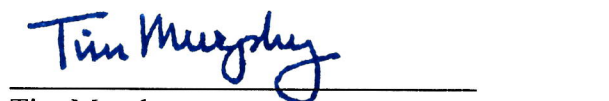
4. Does EPA currently plan to finalize any of these rulemakings, guidance, directives, or other regulatory actions relating to the Clean Power Plan while the stay is in effect? If yes, please identify each such rulemaking, guidance or directive.
5. Have you requested any legal analysis to ensure that the agency has the legal authority to pursue and expend resources on regulatory actions to implement aspects of the Clean Power Plan? If yes, please produce such analysis or analyses to the Committee.
6. Since issuance of the stay, what resources has the agency expended on rulemakings, guidance, and other regulatory actions relating to implementation of the Clean Power Plan?

We appreciate your prompt attention to this request. Should you have any questions, please contact Mary Neumayr or Peter Spencer of the majority committee staff at (202) 225-2927.

Sincerely,



Fred Upton
Chairman

Ed Whitfield
Chairman
Subcommittee on Energy and Power

Tim Murphy
Chairman
Subcommittee on Oversight and Investigations

cc: The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs

The Honorable Frank Pallone, Jr., Ranking Member

The Honorable Bobby Rush, Ranking Member
Subcommittee on Energy and Power

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations